

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

REBECCA A. AZUA
Claimant

V.

KANSAS LEGAL SERVICES
Respondent

AND

QBE INSURANCE CORPORATION
Insurance Carrier

Docket No. 1,071,457

ORDER

Claimant, through Paul V. Dugan, Jr., of Wichita, requests review of Administrative Law Judge Pamela J. Fuller's June 4, 2015 preliminary hearing Order. Anton C. Andersen and Kelsy E. Allison, of Kansas City, appeared for respondent and insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the December 3, 2014 deposition transcript of claimant and exhibit thereto, the February 27, 2015 deposition transcript of Donald L. James, M.D., and exhibits thereto, the March 11, 2015 deposition transcript of claimant, the Joint Stipulation of Evidence filed May 12, 2015, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges she sustained personal injury by accident or injury by repetitive trauma due to sewer gas and mold exposure at respondent's office through June 2, 2014. The judge ruled claimant failed to prove she sustained a personal injury or an occupational disease arising out of and in the course of her employment.

Claimant requests the Order be reversed, arguing she met her burden of proof. At a minimum, claimant requests the Board remand this matter to the judge to order an independent medical examination (IME) to determine causation. Respondent maintains the Order should be affirmed.

The issue for review is:

Did claimant sustain a personal injury by accident, repetitive trauma or an occupational disease arising out of and in the course of her employment?

FINDINGS OF FACT

Claimant, 46 years old, has been employed by respondent since May 2001. She started as a receptionist and later became the managing secretary and domestic paralegal. Claimant worked in respondent's office in the basement at 100 Military Plaza, Dodge City.

Claimant alleges she inhaled mold spores in the workplace which caused her to sustain various injuries, including: hypersensitivity to chemicals/fragrances, skin burning and rashes, headaches, muscle aches, joint aches, changes to her menstrual cycle making it irregular, thyroid issues, adrenal gland issues, digestive issues, chronic constipation, sinus infections, severe congestion, a constantly sore or burning throat, burning nose and eyes, fatigue, insomnia, lack of appetite, forgetfulness, foggiess, irritability, extreme emotional or mood swings, depression, hair loss, heart palpitations and swelling. Claimant testified once or twice a day, she experiences muscle shakes or tremors in which her legs, arms and hands will shake. It normally starts with her hands and then her legs become weak. She testified such weakness caused her to fall down her stairs several times. Medical records say nothing about mold exposure until after claimant learned there was mold in her office in May 2014. Claimant testified her symptoms are worse when it is wet and damp outside.

The earliest medical record in evidence is an October 12, 2009 chart entry from Richard A. Snodgrass, M.D. Claimant was seen for weight management. Dr. Snodgrass' November 19, 2009 entry concerned claimant having bloating and edema in connection with her menstrual period.

An April 26, 2010 follow-up record from James W. Moffitt, M.D., claimant's family doctor, indicates she was doing well on Adderall and able to concentrate. Dr. Moffitt assessed weight gain, dyslipidemia and hyperthyroidism. At some point, claimant was prescribed thyroid medication. Prior records from Dr. Moffitt were not in evidence.

Dr. Moffitt's January 3, 2011 record noted claimant had a sinus infection. Dr. Snodgrass' January 5, 2011 report noted sinus congestion, headache, neck pain, diarrhea and constipation.

Claimant testified respondent's office was in the basement of a really old building and had a "damp, musty smell."¹ Every summer, the air conditioning unit would leak and have to be fixed and the ceiling tiles in the reception area were replaced several times because of stains. She never saw any staining on the walls or carpet nor did she see any visible mold on the ceiling tiles, walls or carpet. Claimant testified that in the fall of 2010 or the spring of 2011, an upstairs toilet overflowed over the weekend causing flooding in the office. The carpet was cleaned, but not replaced.

¹ Claimant Depo. (Dec. 3, 2014) at 90.

Claimant denied ever seeing an allergist or having been diagnosed with allergies or asthma prior to 2011. Claimant stated her symptoms peaked during the summer of 2011. She had similar, less significant, symptoms prior to the summer of 2011, perhaps starting in late 2009, maybe 2010.

While she experienced prior congestion once or twice a year, her congestion became constant in the summer of 2011, when she noticed a “big change” in her health. She began experiencing different symptoms and her health “progressively deteriorated.”² At that time, she did not attribute her deteriorating health to her employment.

Claimant testified her joint aches consist of a dull, aching, constant pain affecting her knees, hands, shoulder and hips which have progressively worsened since the summer of 2011. According to claimant, Dr. Moffitt had no explanation other than old age and he did not prescribe any medication. While he recommended she take an over-the-counter joint supplement, she does not currently take any medication for her joint aches. The muscle aches have remained the same since the summer of 2011, but worsen when she is exposed to irritants like mold or Clorox.

Claimant testified her irregular menstrual cycles have progressively worsened since 2011, which Dr. Moffitt attributed to aging.

Claimant also testified that in 2011, she began having five or six sinus infections a year, but was rarely sick previously. She was prescribed antibiotics, but no additional treatment or referral to a specialist was recommended. Claimant testified she started having adrenal gland issues in the summer of 2011 and she reported her symptoms to Dr. Moffitt, but he did not prescribe medication. According to claimant, she began experiencing chronic constipation and nausea in August 2011. She reported digestive problems to Dr. Moffitt who recommended a cholecystectomy (removal of the gallbladder) which was performed on September 27, 2011.

Claimant testified her memory became foggy in 2011. She testified she forgets simple things like paying a bill, remembering why she walked into a room or where she put something. She received medication for ADHD, which she was diagnosed with before 2011. It helps her concentration. According to claimant, she also experienced a lack of appetite, irritability, extreme emotional swings, swelling in her hands and feet, chronic headaches and a constant sore throat since August 2011.

According to claimant, when she began experiencing extreme fatigue in the summer of 2011, Dr. Moffitt related it to her age, stress and depression. Claimant testified her insomnia began in the fall of 2011 or spring of 2012, and Dr. Moffitt prescribed an antidepressant to help her sleep.

² *Id.* at 13 and 39.

Dr. Moffitt's records further show:

- January 16, 2012: Claimant complained of irregular bowel movements, weight gain, swelling of her hands and feet, tiredness and her back "breaking out" like acne. Dr. Moffitt assessed irritable bowel syndrome and edema.
- May 21, 2012: Dr. Moffitt assessed claimant with allergic rhinitis, hyperlipidemia and hypothyroidism.
- September 10, 2012: Dr. Moffitt noted claimant was complaining about abdominal pain similar to what she had before gallbladder surgery, in addition to nausea and constipation. He assessed right upper quadrant abdominal pain and constipation.
- November 12, 2012: Claimant tried to quit smoking. Chantix made her aggressive and angry.
- November 27, 2012: Claimant had a rash, headache and sore throat. Dr. Moffitt assessed urticaria (hives) and acute pharyngitis.
- January 16, 2013: Claimant had chills, a sore throat, headache, ear pain, fatigue, joint pain and matted eyes that had been burning and itching. She was diagnosed with influenza.
- November 11, 2013: Claimant reported to Dr. Moffitt for ADHD follow-up, constipation, diarrhea and bloating, whole body and face acne, hair loss, increased sweating, feeling worn out and tired and joint pains, perhaps from exercise. Dr. Moffitt assessed hyperlipidemia and hypothyroidism. He suspected claimant had IBS due to gluten intolerance.

Claimant testified there was a sewer leak in respondent's offices. Four pipes above the ceiling tiles were not capped – one in claimant's office, one in a conference room, one in a file storage room and one in another employee's office. Claimant testified the sewer smell was off and on from January until March of 2014, and it caused her eyes and nose to begin to burn. She also experienced nausea and headaches. She denied having headaches prior to the leak. According to claimant, the sewer leak was repaired in late March or April 2014 and her symptoms never went away, but would lessen when she left the building and on weekends. Claimant stated that subsequent to March and April 2014, she has had burning of the eyes and nose and headaches when entering other buildings such as Walmart, Carter's grocery store, the medical center in Dodge City and the courthouses in Cimarron and Dodge City.

According to claimant, in April 2014, she began experiencing burning in her eyes, nose and throat. Her eyes would water and get really red. Claimant testified when she would walk into a certain area of the office, her eyes would “immediately be on fire”³ and then it would go away. She never reported this problem to her eye doctor. Her nose and throat felt like she had swallowed a soft drink wrong.

Claimant testified her skin burning began in April 2014. She also testified that prior to May 12, 2014, she did not have any problems with hypersensitivity to chemicals/fragrances or skin burning. Claimant described the burning feeling as if she had Bengay on her body. It starts in her hands, but sometimes in her feet, face, or ears, and then covers her body. Her skin burning starts when she is exposed to something she is sensitive to such as mold, bleach, specific cleaning chemicals, scented pine cones, certain types of fragrances and caulk. Claimant testified her skin burning will sometimes cause a red rash, but she takes no medication for such condition.

Claimant testified she and other employees worked off-site on May 12 and May 13, 2014 because they had become ill and respondent’s chief executive officer, Marilyn Harp, requested the landlord inspect their premises. On May 13, 2014, claimant was told the landlord had discovered mold in their offices. The mold was located above the ceiling tiles on the pipes and exterior wall of another employee’s office. Claimant testified the mold was black and fuzzy and covered an area approximately “2 foot by maybe 2½, 3 feet.”⁴ While looking at the mold, her “eyes and nose were burning.”⁵ She did not see any actual water dripping and the area did not appear wet or disturbed. She did not touch the mold or get it on her clothing. She never saw the mold on the floor or circulating in the air. The landlord told her he was going to clean the office with bleach, which he did. Other than the one spot, claimant was not aware of mold being found anywhere else.

According to claimant, she worked one-half day in the office on May 14, 2014. She told her supervisor, “I’m sick. I can’t work in here.”⁶ Thereafter, Ms. Harp had respondent’s employees work in the break area in an upstairs part of the building. Claimant worked in the building until May 21 or 22. Claimant noted she was in the building for about 10 minutes and she could not breathe because her throat was closing and she was going to pass out.

After May 23, 2014, claimant worked from home after getting permission from Ms. Harp.

³ *Id.* at 40.

⁴ *Id.* at 70 and 91.

⁵ *Id.* at 92.

⁶ *Id.* at 109.

EMLab P & K performed a spore trap analysis at respondent's office on May 28, 2014. Testing showed the outside spore count was 2,200 m³ (per cubic meter) and 27 m³ in respondent's offices. According to claimant, this testing was done after the landlord cleaned the area with bleach.

Dr. Snodgrass' May 30, 2014 entry noted claimant's office tested positive for mold. She complained her nose and throat burned and about headaches. When claimant saw Dr. Snodgrass on June 9, 2014, she complained of burning and redness to her hands, arms and legs, headaches, eye irritation, body ache and chronic fatigue. Dr. Snodgrass assessed malaise, irregular periods, myalgias, arthralgias and fatigue. Two days later, claimant complained to him about headaches, neck and back pain and chills from a cold.

After learning mold was found in their office and after having dealt with health issues for three and one-half years without a doctor being able to find anything wrong, claimant began searching for a doctor that dealt with environmental issues. As a result, claimant now treats with Donald James, M.D., an ear, nose and throat physician who is board certified in allergies with an emphasis on allergy and immunology. Dr. James testified he has treated many mold cases over the years and perhaps less than 50 in the last year. Dr. James has only rarely been called to testify in litigation, perhaps five times in his career and at least 12 years prior to testifying in this case.

Claimant saw Dr. James six or seven times. Dr. James first evaluated claimant on June 16, 2014. He took a medical history. Claimant reported being a half pack a day smoker with no allergies, ear problems or sore throat while growing up. Her history also included burning eyes and skin. Claimant indicated May 3, 2014 was when her symptoms began. She stated mold was found in her workplace. Claimant informed him that she had mold sensitivities, recurring ear, nose and throat infections, and sinus infections. She reported generalized complaints, muscle fatigue, constant aches, sinus infections, gluten intolerance, rashes, burning eyes, throat and nose when in the office, hair loss, swelling, gum infections, and high anxiety. Claimant did not tell Dr. James about any sewer gas exposure at this initial appointment, but told him about the sewer gas at some later time.

Dr. James' physical examination revealed "very boggy mucoid turbinates or nasal or oral pharyngeal swelling in her very itchy tongue and throat and itchy ears, all related to allergies."⁷ Claimant was quite aware that moldy weather bothered her and she had a lot of digestive complaints. Dr. James assessed chronic sinusitis, allergic skin rash and gastrointestinal dysfunction. Dr. James put claimant on a lubricator decongestant with an antifungal because of her mold sensitivities.

⁷ James Depo. at 20.

Dr. James opined claimant had an “immune environmental overload of some sort”⁸ based on multiple organ system involvement. He diagnosed claimant with chronic sinusitis, post nasal drainage, allergic skin rash and significant gastrointestinal dysfunction. In reaching these diagnoses, he considered claimant’s multiple system complaints, her prior health history and the exposure she described in the workplace.

According to claimant, additional testing of the building was done by respondent in June 2014. An investigator for Terracon performed a mold assessment at respondent’s office on June 23, 2014. The reception area had visible water damage on ceiling panels from a leaking air conditioning unit. There was a two foot by two foot area of mold growth inside the air conditioner. The plenum space above Tim Woods’ office showed signs of prior water damage and discoloration and rusting on pipes in such area.⁹ Test results showed spore or fungi count of 347 m³ in the reception area, 170 m³ in claimant’s office, 127 m³ in Mr. Woods’ office and 147 m³ in Julianne Morland’s office, but 52,850 m³ outside the building.¹⁰ Air sampling suggested an outdoor source for spores, rather than spores released from indoor fungal growth, even though there was visible fungal growth indoors. Terracon suggested the leak be repaired and the air conditioner be replaced or mold growth remediated.

Claimant returned to Dr. James on June 30, 2014 and felt better overall. Her nose, throat and ears did not hurt and were no longer burning. She stated the “roller coaster” was gone, and she had no headaches at that time. They discussed the workplace, air filters and weather changes and completed an overall organ systems history and discussed claimant’s hypothyroid problems. She reported her itchy ear was gone.

Dr. James examined claimant on July 11, 2014. Claimant was wondering about food allergies. She brought in mold reports. Dr. James reviewed the reports and stated they did not help a great deal in his diagnosis other than to confirm claimant had been exposed to mold. They discussed that claimant’s adrenal gland was being burdened. Dr. James switched claimant’s thyroid medication to a natural thyroid supplement in July 2014.

Starting in July 2014, Dr. James put claimant on a diet of lean, unprocessed meats and vegetables with no processed foods, dairy, vinegar, gluten or sugar. According to Dr. James, when yeast and cheese were taken out of claimant’s diet, her symptoms went down. Claimant testified her symptoms did not improve after being on the diet.

⁸ *Id.* at 28.

⁹ Tim Woods works as the managing attorney at respondent’s office.

¹⁰ Julianne Morland is the medical-legal attorney at respondent’s office.

According to claimant, additional testing of the building was done in August 2014 that showed ten times the mold spores after the landlord had cleaned the air ducts and respondent's old office.¹¹ They also found mold in the air conditioning unit directly above the reception area which provided air flow to all of respondent's offices, except the conference room, storage room and claimant's office. She did not know whether the air conditioning system that controlled air flow to her office was tested for mold.

Dr. James' August 26, 2014 report is particularly difficult to read. He and claimant discussed that her lawyer wanted to know if she would be unable to return to the office and that respondent was looking for other offices. Claimant complained of skin, nose and throat burning when dealing with office files.

Respondent's office relocated on October 1, 2014 and claimant resumed working away from home. Claimant indicated they moved offices because she and three other employees were sick and could not work at 100 Military Plaza. Claimant testified she has similar symptoms in respondent's new office. Her symptoms are triggered by paperwork from the courthouse or if someone comes in wearing perfume. Claimant testified that while respondent cleaned the phone system and fax machine before moving it to the new office, she had a severe reaction so respondent purchased new equipment. She testified that some of her symptoms have improved with Dr. James' treatment, such as her digestive system being "back on track," but she is "[a]bout the same" and it will take time for her immune system to rebuild.¹² According to claimant, she has good and bad days and is able to perform all of her tasks.

An inhalant panel was performed on October 6, 2014 and was negative for cat hair, dog dander, mites, six types of grasses, nine types of trees, eight types of weeds and nine types of mold. Actually, claimant's "Conc IU/mL" for aspergillus fumigatus mold was 0.01 and 0.04 for botrytis cineria mold, but the interpretation of the results indicates under 0.05 is negative.¹³

Dr. James saw claimant on November 21, 2014 for a recheck following the inhalant panel. Claimant had aches and pains and her ears hurt all the time. She had mild boggiess and stuffiness of her mucus membranes. Her oral mucus membranes were mildly boggy. Dr. James' diagnoses were chronic allergies, gastrointestinal dysfunction and hypothyroidism. Since November 2014, claimant has been taking allergy drops twice a day to suppress her body's reaction to allergens to help her immune system rebuild itself.

¹¹ No such report was placed into evidence.

¹² Claimant Depo. (Mar. 11, 2015) at 30, 32.

¹³ The document states under 0.5 Conc IU/mL is negative, but it likely should be 0.05 because 0.05 is "very low positive" and 0.5 would be "low moderate positive."

In describing typical symptoms of a mold allergy, Dr. James testified:

Pretty much like any other reaction to an endogen. First thing is they make, they are defending themselves so they make too much mucus, attempting to wash it away, so to speak, lubricate it. But then consequently they will get headaches, they will get sore throats, their eustachian tube gets involved so they get earaches. Their sinuses will react, and that is [a] perfect environment for culture to grow in and get repeat infections that are treated very well with antibiotics, but it will come right back because it's perfect culture media. So it's treating all the symptoms that all allergies cause, particularly in the head and neck, and making mucus and then it all becomes overburdened.

. . .

[T]he inflammation molecules affect the whole body. My field is primarily head and neck, so it's a great deal, if you want to call it, I am using the term plumbing problems, too much mucus, but reactivity to endogens can affect all organ systems.¹⁴

Dr. James testified he has treated patients exposed to sewer gas and the patient response to sewer gas is pretty much the same as with mold. Dr. James did not know the sort of sewer gas to which claimant was exposed, the parts per million of such gas or the duration of exposure, but concluded the sewer gas was another burden on her immune system. The doctor included claimant's sewer gas exposure in her recorded mold exposures.

Dr. James indicated claimant had not been on an antifungal in recent months because "she is out of that office space."¹⁵ He believed there was a causal connection between claimant's medical condition and her work environment based upon her history of exposure, her improvement when away from the moldy environment and her beneficial response to the antifungal. Initially, Dr. James did not consider similar complaints from claimant's coworkers in addressing causation, but agreed it was a factor in hindsight. Dr. James testified claimant's office exposures to mold and methane gas was the "straw that broke the camel's back" and the primary or prevailing factor.¹⁶

Dr. James acknowledged it would be helpful to have all of claimant's medical records, but he did not review any of claimant's medical records.

¹⁴ James Depo. at 13-14.

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 38.

Dr. James recommended claimant try to stay away from allergens, treat any symptoms that arise and strengthen her immune system. His only restriction would be for claimant to stay out of the environment that causes her complaints.

Dr. James admitted he did not know the type of mold to which claimant was exposed, how long she was exposed to mold, the amount of mold or which particular mold caused her to have symptoms because “[t]here are hundreds, maybe thousands of mold.”¹⁷ Dr. James testified the level of mold exposure needed to cause symptoms is variable, but one mold spore is probably not enough. He testified the type of mold is not important because any type of mold could cause claimant’s reaction. Dr. James believed claimant was exposed to mold by breathing the air in the office. He had no information whether the mold was disturbed. Dr. James did not know whether any mold got on claimant or where the mold was in the office.

Dr. James testified there are scientific studies from the American Academy of Environmental Medicine confirming mold causes long-term effects in people. He was unaware of a National Academy of Sciences book indicating there was no verifiable medical evidence confirming a connection between mold exposure and illness. When asked to cite a study showing that “sick building syndrome” exists, Dr. James told respondent’s counsel, “Look it up” and added he has textbooks at his home that discuss the subject matter.¹⁸

Dr. James testified that a legal assistant in a law office is at no greater risk for mold exposure than any other worker or person who works inside. Dr. James indicated a person is exposed to mold whether outside or in a building. Dr. James acknowledged there is mold in every building, but believed respondent’s building was the source of claimant’s mold exposure because of the timing and history provided. He acknowledged claimant has mold in her home basement.¹⁹ Dr. James testified claimant reported being better at home and immediately noticing a difference if she had to go to the office even for short periods of time. Dr. James testified while levels of mold are higher outside, he did not believe claimant was at a greater risk of exposure outside because outside mold is not concentrated in a confined area. He testified whether a person is affected by mold depends upon the amount and length of time they are exposed and whether their immune system becomes overloaded.

¹⁷ *Id.* at 42.

¹⁸ *Id.* at 59.

¹⁹ Claimant was questioned about her home which she has lived in since 2000. It has a main floor and basement. The basement is made of poured concrete. Water got in the basement once about 12 years ago and damaged some drywall in the bathroom. It was repaired and no mold was found. Claimant has not had her air conditioning system or home tested for mold.

Dr. James testified he performed allergy testing and claimant reacted to molds. Dr. James acknowledged the inhalant panel he performed showed claimant was negative for any response to mold. Dr. James testified claimant's mold levels were "pretty low" when he tested her, but not zero.²⁰

Even though claimant had not been exposed to mold for six months, Dr. James opined she still has symptoms because her immune system is still burdened and has not healed or returned to baseline. Dr. James explained that claimant's symptoms become intense in locations other than work because she is now symptomatic of chemicals, perfumes, colognes, fabric shops and candle shops. Dr. James indicated overcast, cloudy, moldy days cause claimant to become fatigued, which is another indication of sickness due to mold.

Dr. James testified that if claimant had itching and burning of her eyes before May 2014, she did not tell him the truth about her prior medical history.

At respondent's request, Allen J. Parmet, M.D., who is board certified in occupational medicine and aerospace medicine and a fellow of the American College of Preventative Medicine, performed a review of claimant's medical records. He did not interview or examine claimant. Dr. Parmet also reviewed the two air sample reports and claimant's testimony. He diagnosed claimant with perimenopausal symptoms, post-cholecystectomy dumping syndrome, hypothyroidism, obesity, depression and ADD by report. Dr. Parmet indicated all of claimant's complaints were clearly attributable to causes other than workplace mold exposure. Based on the industrial hygiene studies showing higher mold exposure outside claimant's workplace and no significant level of mold in her workplace, Dr. Parmet noted there was no occupational basis for claimant's complaints.

Dr. Parmet criticized Dr. James' medical treatment of claimant, especially for thyroidism and potentially off-label use of a medication for a fungal infection that may not exist, and questioned Dr. James' "immune overload" diagnosis. Additionally, Dr. Parmet downplayed what he said was Dr. James' reliance on views espoused by The Environmental Center of Dallas, which Dr. Parmet indicated were not supported by mainstream science or medicine. To the contrary, Dr. Parmet indicated the American College of Occupational and Environmental Medicine and the National Academy Institute of Medicine indicated human health is not adversely affected by inhaled myotoxins in the home, school or office and a causal connection is "weak and unproven."²¹ The doctor further indicated an office worker is at no greater risk for mold exposure than any other worker or person who lives inside, and outside workers face a greater risk.

²⁰ James Depo. at 94.

²¹ Joint Stipulation, Parmet report at 9.

The judge's Order stated:

After review of all the evidence presented, it is found that the claimant did not meet with personal injury arising out of and in the course of her employment, nor did she acquire an occupational disease. The claimant has failed to meet her burden of proof. She has failed to prove that any condition she is suffering from resulted from exposure to mold. Her inhalant panel was negative as to mold. Dr. James stated that he didn't know the type of mold the claimant was exposed to. He can not say what specific mold is causing her symptoms. The level of exposure to cause symptoms is variable. One spore is probably not enough. He did not know how long the claimant was actually exposed to the mold or whether any got on her or even where the mold was in the office. He stated that if a person walks outside or is in any building, they are exposed to mold. Dr. James admitted that he made an assumption that the claimant was exposed to mold that is overloading her immune system. The claimant's inhalant panel was negative as to mold. The claimant didn't have any response to any of the molds.

Dr. Moffitt treated the claimant for a variety of illnesses. He never indicated that any of the conditions were caused by or related to mold exposure. Dr. Parmet reviewed the claimant's medical records and depositions. He determined the claimant suffered from perimenopausal symptoms; post-cholecystectomy dumping syndrome; hypothyroidism; obesity; depression; and ADD by report. He stated the claimant's complaints are clearly attributable to other conditions, not to mold exposure. The industrial hygiene samples from both sources clearly indicate that there is no significant level of mold exposure in the workplace. Dr. Parmet concluded there is no occupational basis for the claimant's complaints. Further, that an office employee is at no greater risk for exposure to molds than any other worker or person who lives inside.²²

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment. Claimant must prove her right to an award based on the whole record using a "more probably true than not true" standard.²³

K.S.A. 2013 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the

²² ALJ Order at 9-10.

²³ K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

K.S.A. 2013 Supp. 44-5a01(b) provides in relevant part:

(b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases

ANALYSIS

The evidence is conflicting and the medical evidence is far from ideal. Dr. Parmet did not evaluate claimant and he did not address the impact of sewer gas exposure. Dr. James' opinion seems to rely heavily on claimant's belief that her myriad symptoms relate to mold exposure. He did not review any medical records from Drs. Moffitt or Strickland. While claimant is perhaps correct that a court-ordered and neutral independent medical evaluation might benefit this case, that is a decision for the judge, not the Board.

While this is a close case, after carefully considering all of the evidence, this Board Member concludes claimant did not prove a compensable claim by a preponderance of the evidence. She simply did not tip the scales in her favor.

CONCLUSIONS

Claimant did not prove a compensable personal injury by accident, injury by repetitive trauma or occupational disease.

WHEREFORE, the undersigned Board Member affirms the June 4, 2015 preliminary hearing Order.²⁴

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Pamela J. Fuller

²⁴ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.